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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Nathaniel V., a Person Coming Under
the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

Landon V.,

Defendant and Appellant.

B216690

(Los Angeles County
Super. Ct. No. CK72028)

APPEAL from orders of the Superior Court of Los Angeles County. Marilyn Mordetzky, Referee. Affirmed.

Karin S. Collins, under appointment by the Court of Appeal, for Defendant and Appellant.

James M. Owens, Assistant County Counsel, and O. Raquel Ramirez, Deputy County Counsel, for Plaintiff and Respondent.

Landon V. (mother) appeals from an order denying her Welfare and Institutions Code section 388 petition as to her son, Nathaniel, and a subsequent order terminating her parental rights.¹ She contends: (1) the summary denial of her petition was an abuse of discretion; and (2) if the order denying her petition is reversed, the order terminating parental rights should also be reversed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2008, eight-month-old Nathaniel lived in an apartment with mother, father and father's wife (stepmother). Nathaniel was detained by the Department of Children and Family Services (the department) following a report that mother and stepmother engaged in a violent altercation in Nathaniel's presence. On March 26, 2008, a petition was sustained when the trial court found Nathaniel was a dependent child within the meaning of section 300, subdivision (b) because: (1) father's female companion attacked mother in Nathaniel's presence; (2) during an altercation between mother and maternal grandmother in the hospital delivery room, Nathaniel was hit in the head with a bottle; and (3) mother and father had a history of substance abuse.

During the ensuing months, mother consistently visited Nathaniel and those visits went well. But mother was terminated from two residential drug treatment programs for stealing. She was a "no show" at all but one drug test and on that occasion she tested positive for marijuana. By the six-month hearing in August 2008, foster mother had expressed an interest in adopting Nathaniel and an adoption assessment had been completed. The department recommended termination of reunification services and adoption as the permanent placement plan. The juvenile court continued the matter for a contested hearing as to the adequacy of reunification services (.21 hearing). (§ 366.21, subd. (e).)

According to the department's report for the .21 hearing, mother had recently enrolled in a parenting education class, but had attended just three sessions; she had not

¹ All future undesignated statutory references are to this code.

participated in random drug testing, nor had she attended a substance abuse treatment program or domestic violence counseling. Meanwhile, mother and father (who had made no progress on the case plan whatsoever) continued to engage in domestic violence. The juvenile court terminated mother's reunification services, finding she had failed to participate and make substantive progress in the court-ordered treatment plan. It set the matter for a section 366.26 hearing (.26 hearing) on February 5, 2009.

On January 29, 2009, mother filed a section 388 petition seeking Nathaniel's immediate release into her custody or, alternatively, additional reunification services and unmonitored visits. A juvenile court referee summarily denied the petition that day, finding the request did not state new evidence or a change of circumstances and that the proposed change did not promote Nathaniel's best interest. On February 2, 2009, notice of the referee's order was mailed to mother's counsel, but mother was not directly served with a copy of the referee's order or findings and neither mother nor her counsel were served with a written explanation of mother's right to rehearing before a judge of the juvenile court as required by section 248.

Mother appeared at the .26 hearing on February 5, 2009. At that hearing, mother's counsel asked the referee to state for the record her reasons for denying the petition. The referee declined to do so, instead suggesting counsel "look in the legal file and see what the reasons are."

The juvenile court continued the .26 hearing to March for completion of a home study and a supplemental report on an ongoing investigation into alleged abuse of another foster child living with foster mother. The supplemental report concluded the accusation of abuse was unfounded and the department had no concerns regarding Nathaniel's safety and well-being in his placement. The matter was continued for a contested .26 hearing on May 19, 2009.

According to the report prepared for the May .26 hearing, mother continued to visit Nathaniel regularly once a week. Despite the termination of her reunification services and the department's recommendation of adoption as the permanent placement plan, mother still wanted to reunify with Nathaniel. Mother did not testify at the hearing;

her counsel argued that the fact mother visited Nathaniel regularly and Nathaniel cried when mother left the visits “is an adequate basis to show a bond with her that to terminate would be against [Nathaniel’s] best interest.” The juvenile court terminated all parental rights, finding Nathaniel likely to be adopted and that no exceptions to the preference for adoption existed.

On June 8, 2009, mother filed a notice of appeal from the January 29 order denying her section 388 petition, the May 19 order terminating her parental rights and “all appropriate appeal issues/findings/orders.”

DISCUSSION

A. *The Notice of Appeal Was Timely*

Mother contends that her notice of appeal from the January 29, 2009 referee’s order denying her section 388 petition was timely despite being filed 130 days after the ruling. She argues that because the referee never caused mother to be directly served with a copy of the order and a written explanation of her right to a rehearing by a juvenile court judge, as required by section 248 and California Rules of Court, rule 5.538(b)(3), the usual time in which to file a notice of appeal from a referee’s order never commenced.² We agree.

An order denying a section 388 petition is an appealable order. (*In re Aaron R.* (2005) 130 Cal.App.4th 697, 703.) But appellate jurisdiction depends upon a timely notice of appeal and an appeal from the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed. (*Melinda K. v. Superior Court* (2004) 116 Cal.App.4th 1147, 1156; *In re Pedro N.* (1995) 35 Cal.App.4th 183, 189.) Accordingly, if mother’s notice of appeal from the referee’s January 29 order denying her section 388 petition was not timely, the appeal from that order must be dismissed notwithstanding that the notice was timely vis-

² All undesignated rule references are to the California Rules of Court.

à-vis the May 19 order terminating her parental rights. We conclude that the appeal was timely filed.

Consistent with the well-established need to conclude dependency proceedings as rapidly as possible consistent with fairness (*In re Sade C.* (1996) 13 Cal.4th 952, 990), the time to appeal juvenile court judgments and orders is abbreviated. Accordingly, notice of appeal from a judgment or subsequent order made by a juvenile court judge or temporary judge must be filed within 60 days after the making of the judgment or order. (Compare rule 8.400(d)(1) [60 days to file appeal from order made by juvenile court judge] with rule 8.104(a)(3) [outside limit of 180 days to file appeal from superior court judgment or order].) In dependency cases, the 60 days begin to run when the judge pronounces the order in open court. (*In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1253.)

Orders made by juvenile court referees are treated differently than those made by judges or temporary judges in several respects. First, while all written juvenile court orders must be served on “the parent *or* the parent’s counsel” (§ 248.5), referees must also cause a copy of their order and findings, as well as a written explanation of the right to seek review by a judge of the juvenile court, to be directly served on the parent at the parent’s last known address.³ (§ 248.)

Second, while an order made by a juvenile court judge is immediately final, a referee’s order is subject to de novo review by a juvenile court judge. (§ 254.) Accordingly, although the referee’s order is immediately *effective*, “it becomes *final* on the expiration of the time allowed by Section 252 for application for rehearing, if application therefor is not made within such time” (§ 250, italics added.) Pursuant to section 252, a parent may apply for rehearing of a referee’s order “[a]t any time prior to the expiration of 10 days after service of a written copy of the order and findings of a

³ Section 248 provides: “A referee . . . shall serve upon . . . the minor’s parent or guardian or adult relative *and* the attorney of record for the minor’s parent or guardian or adult relative a written copy of his or her findings and order *and shall also* furnish . . . to the parent or guardian or adult relative, with the findings and order, a written explanation of the right of such persons to seek review of the order by the juvenile court. . . .” (Italics added.)

referee.” (§ 252; see also rule 5.542(a); Super. Ct. L.A. County, Local Rules, rule 17.14 (a) [procedures for applying for rehearing pursuant to § 252].)

Finally, since a referee’s order is not immediately final, the 60-day time period to file an appeal from a referee’s order does not start when the order is made. Rather, it begins running once the order is final, i.e., after the time to initiate rehearing has expired. Thus, section 395, subdivision (a)(2) provides that a judgment or order entered by a referee “shall become appealable whenever proceedings pursuant to Section 252, 253, or 254 have become completed or, if proceedings [pursuant to those sections] are not initiated, when the time for initiating the proceedings has expired.” The time for initiating such proceedings expires 10 days after the order and advisements are served by mail. (§ 252.)

Sections 395, subdivision (a)(2), 248 and 252 are implemented by several rules of court, which in pertinent part provide as follows:

- Rule 8.400(d)(2) In juvenile cases “heard by a referee not acting as a temporary judge, a notice of appeal must be filed within 60 days after the referee’s order becomes final under rule 5.540(c).”
- Rule 5.540(c) A referee’s order is final for purposes of appeal “10 calendar days after service of a copy of the order and findings under rule 5.538, if an application for rehearing has not been made within that time or if the judge of the juvenile court has not within the 10 days ordered a rehearing on the judge’s own motion under rule 5.542.”
- Rule 5.538(b)(3) After each hearing, the referee must make findings and enter an order and in each case must “promptly” cause the parent and counsel for the parent to be served with “a copy of the findings and order, with a written explanation of the right to seek review of the order by a juvenile court judge. Service must be by mail to the last known address and is deemed complete at the time of mailing.”

Without citation to any authority, the department maintains that the service of the order, findings and written advisement is “a ministerial act, and the clerk’s mailing, as

well as mother's trial attorney's actual knowledge, of the findings and order should trigger" the running of the 60-day period. A similar assertion was rejected by the court in *In re Miguel E.* (2004) 120 Cal.App.4th 521, 538, albeit in a different procedural context. In that case, a referee sustained a section 300 petition on June 17. (*Miguel E.*, at p. 535.) The agency moved to dismiss the child's appeal, filed 71 days later on August 27, as untimely. The agency argued that the order did not have to be served on the child and the child was represented by counsel who was present when the referee made the order; the agency concluded that the referee's order was final 10 days after it was made (June 27) and the child's notice of appeal was due 60 days after that (August 26). (*Id.* at pp. 537-538.) The appellate court disagreed, noting that the agency did not take into account former rule 1416(b) (now rule 5.538(b)(3)), which mandates service of the order on the child's counsel. The court concluded that because the June 17 order was not served by mail on the child's counsel until June 20, the order did not become final until June 30 and notice of appeal was due 60 days later, on August 29; since the notice was filed on August 27, it was timely.⁴ We agree with the court in *Miguel E.* that it is the compliance with the service requirements set forth in section 248 and rule 5.538(b)(3) that starts the time to appeal clock ticking, not the pronouncement of the order by the referee.

Here, the referee denied mother's section 388 petition on January 29; mother's counsel was served with notice of the denial but mother was not, nor were mother or her counsel ever served with written advisement of mother's right to seek de novo review from a juvenile court judge as required by section 248 and rule 5.538(b)(3). Because of these service defects, we conclude mother's appeal is timely.

⁴ But see *In re Madison W.* (2006) 141 Cal.App.4th 1447, in which the court applied the rule for filing appeals from orders in superior court cases (currently rule 8.104) and not the rule for filing appeals from dependency court orders (currently rule 8.400).

B. *The Summary Denial of Mother's Section 388 Petition Was Not an Abuse of Discretion*

Mother contends it was an abuse of discretion to summarily deny her section 388 petition. She argues the petition states facts sufficient to make a prima facie showing of changed circumstances. We find no abuse of discretion.

A parent may petition the juvenile court for a hearing to change, modify, or set aside any of the court's previous orders on grounds of "change of circumstance or new evidence." (§ 388, subd. (a).) "If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held and shall give prior notice" (*Id.*, subd. (d).) Section 388 gives the court two choices: (1) summarily deny the petition or (2) hold a hearing. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) To avoid a summary denial, the petition must make a prima facie showing of evidence which, if believed, would sustain an order granting the petition. If the petition presents evidence that a hearing would promote the child's best interests, the court shall order the hearing. (*Ibid.*) We review the dependency court's ruling on a section 388 petition for an abuse of discretion. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 205.)

Here, on March 26, 2008, the juvenile court sustained an amended petition which alleged, among other things, that mother had a history of substance abuse, was a current abuser of marijuana which affected her ability to provide for Nathaniel, had been under the influence of marijuana while Nathaniel was in her custody, and had positive toxicology tests for marijuana on two occasions. The court-ordered case plan required mother to complete a parent education program, *a drug rehabilitation program with random testing*, and individual counseling to address domestic violence and personal boundaries issues. When mother had failed to comply with the case plan by the six-month review hearing on September 29, 2008, her reunification services were terminated. Four months later, on January 29, 2009, mother filed a section 388 petition based on the following changed circumstances: (1) Nathaniel had a favorable response to mother; (2) mother had completed parenting and anger management classes, was regularly

attending Narcotics Anonymous meetings and had participated in six individual therapy sessions; (3) consistently visited Nathaniel; (4) obtained suitable housing; (5) intended to enroll in school to better herself; and (6) intended to be “the full-time provider” for Nathaniel. But mother had not completed a drug rehabilitation program and had not drug tested, and there was no allegation, much less evidence, that she was actually drug free. Although mother’s completion of parenting classes, attendance of Narcotics Anonymous meetings, consistent visitation and good intentions to continue her education to better herself are all commendable, her failure to complete a drug rehabilitation program and to drug test precludes a finding that her circumstances had changed. (Cf. *In re Mary G.*, *supra*, 151 Cal.App.4th at pp. 205-206 [three months of sobriety did not constitute changed circumstances].) Given this, the juvenile court did not abuse its discretion by finding no change of circumstances.

Inasmuch as we affirm the order summarily denying mother’s section 388 petition, we need not address mother’s assertion that “if the summary denial of mother’s section 388 petition is reversed, the order terminating her . . . parental rights must also be reversed.”

DISPOSITION

The orders are affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.